The Honorable Robert J. Bryan

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON AT TACOMA

SEATTLE PACIFIC UNIVERSITY *Plaintiff*, v. ROBERT FERGUSON, in his official capacity as Attorney General of Washington *Defendant*.	No. 3:22-cv-05540-RJB PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS ORAL ARGUMENT REQUESTED

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INTRODUCTION

Washington's Attorney General has launched an unprecedented probe into the religious decisions of a religious organization. When Seattle Pacific University challenged that probe, the AG doubled down, adding retaliation to constitutional injury. Now he moves to dismiss, claiming no federal court can review his actions, no matter how problematic, because the moment SPU's claims become ripe, abstention kicks in. This "heads I win, tails you lose" argument is not the law.

SPU has standing, its claims are ripe, and there is no reason for this Court to abstain. SPU properly pleads pre-enforcement challenges to a state statute: the AG's actions are a credible threat of enforcement, and SPU satisfies the Article III standard. Prudential ripeness isn't a concern: SPU challenges an entangling probe that is itself constitutionally prohibited, as well as unconstitutional retaliation. Those issues are primarily legal and fit for review. Nor is there any reason for this Court to abstain from hearing the case, since *Younger* abstention doesn't apply to state civil investigations that have not resulted in state court or administrative adjudication.

The AG's jurisdictional arguments are a distraction, as SPU properly pleads its constitutional claims. SPU has alleged facts to show that the Washington Law Against Discrimination (WLAD) is unconstitutional as applied to SPU's religious hiring. The AG acts as if SPU has no First Amendment protections other than the ministerial exception. Not so. The First Amendment protects religious employers in several other ways. One of those protections limits government fishing expeditions into religious employment decisions. Another requires that the law be neutral, generally applicable, and free from retaliatory application. SPU seeks the freedom to do what the law has long protected: select employees who share its religious beliefs and exercise.

BACKGROUND

SPU is a private, Christian liberal arts university. Dkt. #16 ¶ 1. It was founded to "maintain, conduct and operate an institution of learning … under the auspices of the Free Methodist Church." *Id.* ¶¶ 17, 19, 25. Its Statement of Faith is structured around four pillars: "historically orthodox, clearly evangelical, distinctively Wesleyan, and genuinely ecumenical." *Id.* ¶ 29. Consistent with the teachings of the Free Methodist Church, SPU holds sincere religious beliefs on sexuality and

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marriage—it "affirm[s] that sexual experience is intended between a man and a woman" within "the covenant of marriage." Dkt. #16-2; Dkt. #16 ¶¶ 25, 30-31.

It is essential to SPU's religious mission to maintain a faculty and staff that affirm SPU's guiding policies and live out their Christian faith. Dkt. #16 ¶¶ 32-33. Accordingly, SPU requires its faculty and staff (save student and temporary employees) to affirm its Statement of Faith and to abide by lifestyle standards consistent with those religious beliefs. *Id.* ¶ 31. One standard prohibits sexual intimacy outside of marriage between a man and a woman. *Id.* To permit employment of Christians in same-sex marriages would violate SPU's faith and end SPU's longstanding affiliation with the Free Methodist Church. *Id.* ¶ 34. Despite pushback from some members of the SPU community, SPU's Board of Trustees recently voted to retain these religious hiring policies. *Id.* ¶¶ 35-40. This prompted "hundreds" of complaints to the AG by people who disagree generally with SPU's religious beliefs and hiring policies. *Id.* ¶¶ 41-45; Dkt. #16-4.

Until recently, the WLAD protected SPU's right to hire according to its faith. The employment provision expressly exempts "any religious or sectarian organization not organized for private profit." RCW 49.60.040(11). But the Washington Supreme Court invalidated much of this exemption under the state constitution in *Woods v. Seattle's Union Gospel Mission*, 481 P.3d 1060 (Wash. 2021). Religious nonprofits are now subject to the WLAD's prohibition on sexual orientation and gender identity discrimination, except as to "ministers" under the First Amendment's "ministerial exception." *Id.* at 1069-70. *Woods* did not address other First Amendment rights that religious employers have, *id.* at 1070, leading two Justices of the United States Supreme Court to note that "the Washington Constitution may, however, have created a conflict with the Federal Constitution," *Seattle's Union Gospel Mission v. Woods* (*SUGM*), 142 S. Ct. 1094, 1096 (2022) (Alito, J., joined by Thomas, J., concurring in the denial of certiorari.). The Justices explained that "the guarantee of church autonomy is not so narrowly confined" as *Woods* presumed. *Id.*

On June 8, 2022, the AG sent a letter to SPU announcing a probe under the WLAD and *Woods* into whether SPU discriminates based on sexual orientation in its hiring, "including by prohibiting

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same-sex marriage and activity." Dkt. #16 ¶ 47; Dkt. #16-1. The letter demands production of voluminous and sensitive internal information. Dkt. #16 ¶ 46; Dkt. #16-1. The AG seeks, without limitation, information on "every instance" where SPU's policies relating to sexuality and marriage have been applied in hiring decisions, discipline, and employment disputes with "each" and "any" "prospective, current, or former faculty, staff, or administrator." Dkt. #16 ¶¶ 47-51, 54; Dkt. #16-1 at 2. The letter also directs SPU to implement a litigation hold and attest to it "under penalty of perjury." Dkt. #16 ¶ 55; Dkt. #16-1 at 2. The letter ignores SPU's First Amendment rights and the religious exemption to the WLAD. *See* Dkt. #16 ¶¶ 48, 52-53, 56-61. SPU alleges that the AG is targeting it due to its religious beliefs. *Id.* ¶¶ 45, 49, 52, 63-64. When SPU did not produce the documents, an assistant AG warned he would "alert AG Ferguson." Dkt. #16-3 at 1.

SPU promptly filed this lawsuit, seeking protection against the AG's intrusive investigation. The AG responded with a press release, attempting to justify his actions by pointing to the complaints his office received. Dkt. #16 ¶ 67; Dkt. #16-4. He also called on more people to file complaints against SPU. Dkt. #16 ¶ 68; Dkt. #16-4. The AG then moved to dismiss, making clear his intent to continue the probe and enforce the WLAD against SPU as to non-ministerial employees. Dkt. #15 at 16; *see* Dkt. #16 ¶¶ 74-76. SPU amended its complaint, adding further allegations of the credible and substantial threat of enforcement of the WLAD, contrary to its constitutional rights. Dkt. #16 ¶¶ 66-78. The AG again moved to dismiss.

STANDARD OF REVIEW

Under both Rule 12(b)(1) and 12(b)(6), the Court must accept as true all facts alleged in the complaint and draw all reasonable inferences in SPU's favor. *Snyder & Assocs. Acquisitions LLC v. United States*, 859 F.3d 1152, 1156-57 (9th Cir. 2017); *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (same standard under 12(b)(1) for attack on jurisdictional allegations). To survive the AG's Rule 12(b)(6) challenge, SPU's complaint need only allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

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ARGUMENT

I. SPU's First Amendment claims are justiciable.

A. SPU has standing to bring this pre-enforcement challenge.

SPU brings a pre-enforcement challenge to the application of a state statute, the WLAD, to its religious hiring practices. The AG argues that SPU lacks cognizable injury and redressability, but his arguments ignore the pre-enforcement standard and conflate justiciability with the merits.

A plaintiff has standing to bring a First Amendment pre-enforcement challenge when (1) the plaintiff "has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest," (2) the plaintiff's "future conduct is also arguably proscribed by the statute [it] wish[es] to challenge," and (3) there is a "credible threat of enforcement." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 160, 162, 167 (2014) (cleaned up). "[W]hen the threatened enforcement effort implicates First Amendment rights, the [standing] inquiry tilts dramatically toward a finding of standing." *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1172 (9th Cir. 2018). The AG never mentions this standard or the recent *Tingley* case, where this Court and the Ninth Circuit rejected many of the same arguments he makes here. *See Tingley v. Ferguson*, 557 F. Supp. 3d 1131 (W.D. Wash. 2021), *aff'd*, 47 F.4th 1055 (9th Cir. 2022). SPU has standing.

First, SPU's religious hiring standards are protected by the First Amendment. *Infra* Section III.A, C. Thus, they are at least "arguably affected with a constitutional interest." *Driehaus*, 573 U.S. at 149. SPU has likewise alleged that it has applied—and will continue to apply—these standards to all regular faculty and staff, ministers and non-ministers alike. Dkt. #16 ¶¶ 31-34. Such allegations suffice. *See Arizona v. Yellen*, 34 F.4th 841, 850 (9th Cir. 2022) (plaintiff need not "admit to violating the law or having a desire to do so" for standing).

Second, the AG could not be clearer: "First Amendment … protections *do not* extend to discrimination against the University's non-ministerial employees, to whom the WLAD's prohibition of employment discrimination on the basis of sexual orientation *would apply*." Dkt. #18 at 17 (emphasis added); *accord id.* at 2, 7-10, 13, 19. SPU applies its sexual conduct policies to all regular

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faculty and staff regardless of ministerial status. Dkt. #16 ¶ 31. SPU need only show its conduct is "arguably proscribed," and it has done so. *Driehaus*, 573 U.S. at 163.

Third, the probe establishes a credible threat of enforcement. A credible threat means that "the prospect of future enforcement" is not merely "imaginary or speculative." *Driehaus*, 573 U.S. at 165. Standing doesn't require the government to have "issued a warning or threat" to the plaintiff. *Tingley*, 47 F.4th at 1068. The government's mere "failure to disavow enforcement of the law … weigh[s] in favor of standing." *Id.*; *accord Driehaus*, 573 U.S. at 165. The Ninth Circuit also looks to the history of enforcement. *Yellen*, 34 F.4th at 850. SPU's case easily meets this standard. The AG takes the position that religious hiring policies like SPU's are unlawful. Far from disavowal, there has been a specific threat of prosecution: the AG opened an investigation and told SPU to turn over years' worth of employment documents about every position at the school. Dkt. #16 ¶¶ 47-51; Dkt. #16-1. The AG also claimed hundreds of complaints have been filed against SPU, and called for more. Dkt. #16 ¶¶ 43, 66-68; Dkt. #16-4. And there has been past enforcement: a lawsuit against SPU for its hiring practices. Dkt. #16 ¶ 37; *see Driehaus*, 573 U.S. at 164 (past enforcement by private complainants was relevant). The AG also instructed SPU to initiate a litigation hold and certify to it under penalty of perjury. Dkt. #16-1 at 2, 4. The AG cannot simultaneously insist that litigation is reasonably foreseeable yet not a credible threat.

The risk of enforcement is far greater here than what the Ninth Circuit and this Court considered sufficient in prior cases. *See, e.g.*, *Italian Colors Rest.*, 878 F.3d at 1172-74 (credible threat of enforcement where restaurant alleged "specific intent to impose [proscribed] surcharges" and state did not disavow); *Lakeview Fin. v. Dep't of Fin. Inst. ex rel. Clark*, No. 21-cv-05267-RJB, 2021 WL 2530727, at *3 (W.D. Wash. June 21, 2021) ("credible threat of civil enforcement" where agency's subpoena and settlement offer "support[ed] a well-founded fear that [defendant] is seriously investigating [plaintiff] and may enforce the law against it"). Particularly since First Amendment rights are at stake, SPU has standing for pre-enforcement review.

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B. SPU's injuries are redressable.

The AG also argues that SPU's alleged injuries aren't redressable because the Religion Clauses preclude "only those" employment discrimination claims concerning ministers. Dkt. #18 at 8. This fails to address the retaliation claims (Counts I and XI), the ministerial exception and church autonomy claims based on the probe (Counts III and IV), and the claims that the WLAD is not generally applicable, neutral, or neutrally applied to SPU (Counts V, VII, and VIII). And, as explained below, the Religion Clauses protect certain employment decisions even for non-ministers. (Counts II, IX, and X). All of SPU's claims can be redressed by the declaratory and injunctive relief sought.

C. SPU's claims are ripe.

Constitutional ripeness "coincides squarely with standing's injury in fact prong" and so "is often treated under the rubric of standing." *Bishop Paiute Tribe v. Inyo County*, 863 F.3d 1144, 1153 (9th Cir. 2017). The AG raises no constitutional ripeness issue distinct from standing. *See* Dkt. #18 at 10-11. Accordingly, constitutional ripeness exists for the reasons explained above.

The AG argues instead that the Court should decline jurisdiction on prudential ripeness grounds. *Id*. at 10-14. But doing so would be in "tension with … the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Driehaus*, 573 U.S. at 167 (cleaned up). This is particularly true with the claims that, like those in *Driehaus*, turn on a pre-enforcement challenge to the application of a statute (Counts II, IV, V, VI, IX and X). SPU has met the standard for bringing such a challenge, so these claims are ripe. *See Lakeview Fin.*, 2021 WL 2530727, at *4 (plaintiff "demonstrate[d] a credible threat of enforcement that ma[de] its claim ripe for adjudication" where defendant "made clear that it is investigating [plaintiff], and that a formal Statement of Charges may follow").

Next are the claims that the probe itself is constitutionally prohibited and conducted in a manner that improperly targets SPU (Counts III, VII, and VIII). SPU has detailed why the Constitution prohibits this wide-ranging probe of a religious organization. SPU has also plausibly alleged that the AG targeted it based upon its denominational affiliation and religious beliefs and that he failed

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to take such steps against others with different religious beliefs. Discovery would elucidate these claims, but the elements have been properly, and plausibly, pled. They are ripe now.

The same is true of SPU's retaliation claims (Counts I and XI). SPU properly pled the elements, and, as discussed below, its claims are unlike those in *Twitter v. Paxton.* As the Supreme Court said in *Driehaus*, "we need not resolve the continuing vitality of the prudential ripeness doctrine in this case because the 'fitness' and 'hardship' factors are easily satisfied here." 573 U.S. at 167.

1. This case is fit for judicial decision.

The fitness prong is met where "the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Stormans v. Selecky*, 586 F.3d 1109, 1126 (9th Cir. 2009). Each factor is present here.

Like most pre-enforcement First Amendment challenges, this case presents primarily legal issues, and no further factual development is necessary. *See, e.g.*, *Tingley*, 47 F.4th at 1070. SPU claims that the First Amendment protects its religious policies against the WLAD, regardless of ministerial status; that SPU's church autonomy rights preclude forced disclosure of internal documents; and that the WLAD is being enforced in an unconstitutional manner. Dkt. #16 ¶¶ 79-178. SPU's claims "present a concrete factual situation" for the Court "to delineate the boundaries of what conduct the government may or may not regulate without running afoul of the Constitution." *Alaska Right to Life PAC v. Feldman*, 504 F.3d 840, 849 (9th Cir. 2007) (cleaned up).

The AG relies heavily on *Thomas v. Anchorage Equal Rights Commission*, which pre-dates *Driehaus* and is not analogous. There, the plaintiffs' claim "rest[ed] upon hypothetical situations" and was "devoid of any specific factual context." 220 F.3d 1134, 1141-42 (9th Cir. 2000) (en banc). But the circumstances here are not hypothetical: SPU prohibits employees from engaging in sexual intimacy outside a traditional marriage, the AG claims this violates the WLAD with respect to non-ministerial employees, and SPU asserts First Amendment protection. And SPU's complaint "provide[s] enough of a specific factual context for the legal issues [SPU] raises." *Tingley*, 47 F.4th at 1070; *see also Bishop Paiute*, 863 F.3d at 1154 (fitness met where complaint "present[ed] a detailed factual account of the underlying disputes").

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SPU challenges final action. Courts consider whether the action "is a definitive statement of an agency's position," "has a direct and immediate effect on the complaining parties," "has the status of law," and "requires immediate compliance with its terms." *Ass'n of Am. Med. Colls. v. United States*, 217 F.3d 770, 780 (9th Cir. 2000). The AG has taken a definite position on the interpretation of the WLAD after *Woods*, maintains that his interpretation directly affects SPU, and requires immediate compliance with that interpretation of the law. The AG's assertion that he has "made no legal conclusions about the legality of SPU's employment practices" rings hollow. Dkt. #18 at 13. He undoubtedly has "'pre-determine[d]' the future action" of his office with respect to non-ministerial employees. *Am.-Arab Anti-Discrim. Comm. v. Reno*, 70 F.3d 1045, 1061 (9th Cir. 1995). SPU is currently being investigated and faces a credible threat of enforcement, so it need not wait for the AG's inevitable application of the WLAD to SPU. *See, e.g.*, *Laub v. U.S. Dep't of the Interior*, 342 F.3d 1080, 1088-91 (9th Cir. 2003). That's the whole point of a pre-enforcement challenge. Ripeness "do[es] not require parties to operate beneath the sword of Damocles until the threatened harm actually befalls them." *Iowa League of Cities v. EPA*, 711 F.3d 844, 867 (8th Cir. 2013).

The AG relies exclusively on *Twitter*, *see* Dkt. #18 at 12-13; but *Twitter* is inapposite. First, Twitter challenged only a state investigation, asserting only retaliation claims. *Twitter v. Paxton*, 26 F.4th 1119, 1121-22 (9th Cir. 2022), *reh'g pet. filed* (Mar. 30, 2022). Here, SPU brings a pre-enforcement challenge to a state statute, in addition to investigation-based retaliation claims. Second, as to fitness, in *Twitter* it was unclear how Texas law applied; the Texas AG was investigating whether Twitter's statements were misleading commercial speech or not, which "is not solely a legal issue because it depends on 'further factual amplification.'" *Id.* at 1125. But SPU presents several purely legal questions. And unlike *Twitter*, SPU challenges the application of prudential ripeness where standing is satisfied. *See id.* at 1123 n.1. Moreover, SPU is a religious organization subject to special First Amendment limitations on entangling government investigations. *See infra* Section III.B. The First Amendment itself treats a religious university differently from Twitter. *Cf. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189 (2012) ("We

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find this position untenable. … [T]he text of the First Amendment itself … gives special solicitude to the rights of religious organizations.").

2. SPU would suffer hardship absent judicial review.

Because SPU's claims satisfy the fitness prong, the Court need not consider hardship. *See Skyline Wesleyan Church v. Cal. Dep't of Managed Health Care*, 968 F.3d 738, 753 (9th Cir. 2020). Even so, SPU's hardship weighs decisively in favor of immediate review. SPU alleges that the AG's actions are chilling its First Amendment activity. Dkt. #16 ¶¶ 65, 165. This is sufficient hardship. *See Driehaus*, 573 U.S. at 167-68; *Tingley*, 47 F.4th at 1071. The AG only argues that his hardship outweighs SPU's. Dkt. #18 at 13. But the AG suffers no hardship in being barred from unconstitutional actions. *Cf. N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) ("The Government does not have an interest in the enforcement of an unconstitutional law.").

II. *Younger* abstention does not apply.

Younger abstention should be applied only in "exceptional circumstances." *Sprint Commc'ns v. Jacobs*, 571 U.S. 69, 78 (2013). The Supreme Court's "dominant instruction [is] that, even in the presence of parallel state proceedings, abstention from the exercise of federal jurisdiction is the 'exception, not the rule.'" *Id.* at 81-82. No such exception applies here.

The AG relies on the *Younger* category for certain civil enforcement proceedings that are "akin to criminal proceedings." *ReadyLink Healthcare v. State Comp. Ins. Fund*, 754 F.3d 754, 759 (9th Cir. 2014). Even if the action falls into that category, "*Younger* abstention is applicable, but only if the three additional factors … are also met: that the state proceeding is 1) "ongoing"; 2) "implicate[s] important state interests"; and 3) "provide[s] adequate opportunity ... to raise constitutional challenges." *Applied Underwriters v. Lara*, 37 F.4th 579, 588 (9th Cir. 2022) (quoting *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982)). *Younger* does not apply here because (1) this is the wrong kind of civil enforcement proceeding under *Younger* and (2) it is not an ongoing proceeding like that in *Applied Underwriters* and *Middlesex*.

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A. This is not a quasi-criminal enforcement action.

A state official's employment investigation, without more, is not a quasi-criminal enforcement action under *Younger*. The Ninth Circuit refused to apply *Younger* when "state mandamus actions made [plaintiff] the subject merely of *prospective* enforcement." *Potrero Hills Landfill v. County of Solano*, 657 F.3d 876, 885 (9th Cir. 2011). And it has explained that "the mere 'initiation' of a judicial or quasi-judicial administrative proceeding" is insufficient. *ReadyLink Healthcare*, 754 F.3d at 760. Instead, the court looks at whether the civil proceeding is akin to criminal prosecution, such as "a civil enforcement action brought by the Attorney General seeking civil penalties, injunctive relief, and damages." *Bristol-Myers Squibb Co. v. Connors*, 979 F.3d 732, 736 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2796 (2021).

That's not possible here, where the AG has not brought any state court action, and the WLAD does not vest the AG with adjudicatory authority over complaints or the power to decide cases. That power rests with the Human Rights Commission, which may receive complaints, conduct investigations, and attempt conciliation, *see* RCW 49.60.240, and with administrative law judges, who may determine cases and issue orders after conciliation has failed, *see* RCW 49.60.250. The AG starts proceedings by bringing a claim in court, something he has done repeatedly. Dkt. #18 at 3 n.1; *Cases*, Wash. State Off. Att'y Gen, https://www.atg.wa.gov/cases (last visited Oct. 11, 2022). But he has not yet done so here. Where the state official in question has no independent authority to adjudicate a claim and has not taken a claim to state court, it is not the kind of "civil enforcement proceeding" to which *Younger* applies.

Indeed, the AG cites no cases applying *Younger* to employment investigations that had not yet progressed to judicial or administrative proceedings. In *Dayton Christian*, a complaint was filed with the appropriate state commission, which investigated, attempted conciliation, and "initiated administrative proceedings against [Dayton Christian] by filing a complaint." *Ohio C.R. Comm'n v. Dayton Christian Sch.*, 477 U.S. 619, 623-24 (1986). Only then did the plaintiff seek federal injunctive relief against the proceedings. *Id.* at 624-25. *Bristol-Myers* is even less apt, since "nearly six years after the state-court litigation began, the companies turned to federal court to seek an

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injunction against the state proceeding." 979 F.3d at 735. In *Alsager*, the board at issue was engaged in actions that were "judicial in nature," as the board was "charged with reviewing complaints, … charging physicians, holding hearings and then making disciplinary decisions." *Alsager v. Bd. of Osteopathic Med. & Surgery*, 945 F. Supp. 2d 1190, 1195 (W.D. Wash. 2013), *aff'd*, 573 F. App'x 619 (9th Cir. 2014). The same is true in *Washington Ass'n of Realtors v. Washington State Public Disclosure Commission*, No. 09-cv-5030RJB, 2009 WL 10726078, at *6 (W.D. Wash. May 19, 2009), where the state commission was charged with investigating then conducting "an adjudicative proceeding," and in *Amanatullah v. Colorado Board of Medical Examiners*, 187 F.3d 1160, 1163 (10th Cir. 1999), where state law gave the board administrative powers. By contrast, the AG has no charging or adjudicative power under the WLAD. No state official has filed a formal administrative complaint against SPU, no state court proceedings have been initiated, and the AG acts not as a quasi-judicial official but as a potential litigant.

The more apt analogy is *Telco Communications v. Carbaugh*, where the Fourth Circuit reasoned that "Appellant's contention—that abstention is required whenever enforcement is threatened—would leave a party's constitutional rights in limbo while an agency contemplates enforcement but does not undertake it." 885 F.2d 1225, 1229 (4th Cir. 1989). The court held that an "informal fact-finding conference" and "investigation" did not warrant abstention, distinguishing *Dayton Christian*, since there the plaintiff "brought suit in federal court after the Ohio Civil Rights Commission had initiated formal administrative proceedings." *Telco*, 885 F.2d at 1228-29. An investigation and threatened litigation can have serious constitutional impact, without becoming the kind of civil enforcement proceeding that implicates *Younger*.

B. Multiple courts have held that it is incorrect, even clearly erroneous, to apply *Younger* abstention to a government investigation.

Even if this were the right type of proceeding, abstention would still be inappropriate at this stage. An investigation that has not yet resulted in charges or a state court proceeding is not "ongoing" under *Middlesex*: "If a judicial proceeding is only *imminent*, *Younger* abstention is inappropriate because that proceeding is not *pending* or *ongoing*." *PDX N. v. Comm'r N.J. Dep't of Lab.*

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& Workforce Dev., 978 F.3d 871, 886 (3d Cir. 2020), *cert. denied sub nom.*, *PDX N. v. Asaro-Angelo*, 142 S. Ct. 69 (2021). As this Court has explained, "the mere 'possibility that a state proceeding may lead to a future prosecution of the federal plaintiff is not enough.'" *Lakeview Fin.*, 2021 WL 2530727, at *2 (collecting cases). Where state proceedings are "merely threatened," it is "clearly erroneous" to abstain from hearing the case. *Malhan v. Sec'y U.S. Dep't of State*, 938 F.3d 453, 463-64 (3d Cir. 2019).

Thus, multiple courts of appeals have held that *Younger* cannot apply to a state investigation that has not yet culminated in judicial proceedings or formal charges.[1] As the Fourth Circuit said in *Telco*, "the period between the threat of enforcement and the onset of formal enforcement proceedings may be an appropriate time for a litigant to bring its First Amendment challenges in federal court. Indeed, if this time is never appropriate, any opportunity for federal adjudication of federal rights will be lost." 885 F.2d at 1229. The Supreme Court echoed this reasoning in *Driehaus*, where it took "the threatened Commission proceedings into account because administrative action, like arrest or prosecution, may give rise to harm sufficient to justify pre-enforcement review." 573 U.S. at 165. SPU sued after enforcement was threatened and an investigation began but before the initiation of a lawsuit by the AG's office. This is the proper time to bring constitutional claims—it is neither too early nor too late.

III. SPU has properly pleaded that the AG's application of the WLAD to its religious hiring standards violates the First Amendment.

The WLAD, as altered by the Washington Supreme Court and applied in the AG's probe, violates the First Amendment in four different ways. First, it violates SPU's right under the church autonomy doctrine to set religious conduct standards for employees—ministers and non-ministers alike. Second, even aside from the broader church autonomy doctrine, the AG's wide-ranging probe

[1] *See, e.g.*, *Mulholland v. Marion Cnty. Election Bd.*, 746 F.3d 811, 817 (7th Cir. 2014) (declining *Younger* abstention because "a federal court need not decline to hear a constitutional case within its jurisdiction merely because a state investigation has begun"); *United States v. South Carolina*, 720 F.3d 518, 527 (4th Cir. 2013) ("We have also drawn a distinction between the commencement of 'formal enforcement proceedings,' at which point *Younger* applies, versus the period of time when there is only a 'threat of enforcement,' when *Younger* does not apply."); *Guillemard-Ginorio v. Contreras-Gómez*, 585 F.3d 508, 519 (1st Cir. 2009) ("the agency's investigation of the plaintiffs was at too preliminary a stage to constitute a 'proceeding' triggering *Younger* abstention").

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violates the ministerial exception. Third, the WLAD and the probe are not neutral and generally applicable, or neutrally applied, and therefore violate the Free Exercise Clause. And fourth, SPU has plausibly alleged that the AG launched the probe and called for more complaints against SPU in retaliation for SPU exercising its rights under the Religion Clauses and the Petition Clause.

A. The First Amendment protects SPU's employment decisions based on religious doctrine regardless of whether the employee is a "minister." (Counts II, III, IX, and X)

"The First Amendment protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020) (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)). "This does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission." *Id.* at 2060. This autonomy includes the ministerial exception, *id.* at 2060-61, but it doesn't stop there, *SUGM*, 142 S. Ct. at 1096 (Alito, J., concurring). The ministerial exception bars employment discrimination claims by ministers, full stop, regardless of the reason for the discharge. *Hosanna-Tabor*, 565 U.S. at 194. But church autonomy also bars employment claims by any personnel (including non-ministers) in a narrower set of circumstances: when the religious body has a "religious reason for an employment action." *Rweyemamu v. Cote*, 520 F.3d 198, 207 (2d Cir. 2008).

Thus, in *NLRB v. Catholic Bishop of Chicago*, the Supreme Court barred the NLRB from exercising jurisdiction over teachers at religious schools, regardless of whether those teachers had religious duties or instead taught only "secular subjects." 440 U.S. 490, 501 (1979). Rather, because "the schools had responded that their challenged actions were mandated by their religious creeds," the Supreme Court held that the "very process of inquiry" into "the school's religious mission … may impinge on rights guaranteed by the Religion Clauses." *Id.* at 502.

The D.C. Circuit recently applied the same reasoning in a case strikingly similar to this one. There, the NLRB decided that religious universities were exempt from a statute with regard to adjunct faculty in the theology department, but not in secular departments. *Duquesne Univ. of the*

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Holy Spirit v. NLRB, 947 F.3d 824, 827 (D.C. Cir.), *reh'g en banc denied*, 975 F.3d 13 (D.C. Cir. 2020). As a result, it asserted jurisdiction over that university and its relationship to non-theology adjunct teachers. *Id.* The DC Circuit held that the NLRB lacked jurisdiction over the adjunct faculty, explaining that "the Religion Clauses establish a 'scrupulous policy ... against a political interference with religious affairs.'" *Id.* at 827-28. To rule otherwise, the court reasoned, would end "with the Board trolling through the beliefs of the University, making determinations about its religious mission and whether certain faculty members contribute to that mission. This is no business of the State." *Id.* at 835 (cleaned up).

The same is true here. The Washington Supreme Court has determined that state law applies to non-ministerial positions at religious employers but not to ministerial positions. *Woods*, 481 P.3d 1060. The AG now asserts the power to investigate *all* of a religious university's employment decisions, to troll through the beliefs of the University, and to make determinations about which employees are sufficiently religious. Such entangling inquiries are no business of the state.

This is similar to the reasoning in *Amos*, where the Supreme Court upheld the constitutionality of Title VII's broad religious exemption because it "alleviate[d] significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339 (1987). The Court rejected "the kind of intrusive inquiry into religious belief that the District Court engaged in," which would require courts to "examine the nexus between the primary function of the activity in question" and a religious group's "religious rituals or tenets." *Id.* at 331 n.6, 339.

Multiple courts of appeals have also "protected the autonomy of religious organization to hire personnel who share their beliefs." *SUGM*, 142 S. Ct. at 1094 (Alito, J., concurring). For example, the Tenth Circuit barred a church employee's Title VII claims because the "alleged misconduct is rooted in religious belief" and found the ministerial exception "inquiry unnecessary … because [the] claims [we]re based solely on communications that are protected by the First Amendment under the broader church autonomy doctrine." *Bryce v. Episcopal Church in Diocese of Colo.*, 289

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F.3d 648, 657-58 & n.2 (10th Cir. 2002) (cleaned up); *accord Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 197 n.15 (2d Cir. 2017) ("a religious reason … proffered" for termination can render "a foray into the ministerial exception" unnecessary). The Sixth Circuit likewise held that "the First Amendment does not permit … courts to dictate to religious institutions how to carry out their religious missions or how to enforce their religious practices" because these groups have a "constitutionally-protected interest … in making religiously-motivated employment decisions." *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 623, 626 (6th Cir. 2000). And the Third Circuit dismissed discrimination claims of a teacher at a Catholic school, reasoning that where "the claim is that the employee's beliefs or practices make her unfit to advance" the "employer's religious mission," it is "difficult to imagine an area of the employment relationship *less* fit for scrutiny by secular courts." *Little v. Wuerl*, 929 F.2d 944, 949 (3d Cir. 1991).[2]

Outside the ministerial exception, the Ninth Circuit likewise looks to whether the religious organization "offer[s] a religious justification" for its actions. *Bollard v. Cal. Province of Soc'y of Jesus*, 196 F.3d 940, 947 (9th Cir. 1999). Thus, in *Puri v. Khalsa*, the claim wasn't barred because the plaintiffs undisputedly met defendants' "religious eligibility requirements." 844 F.3d 1152, 1159, 1167 (9th Cir. 2017). But the calculus changes when the religious employer *does* have a religious reason: "If the government coerced staffing of religious institutions by persons who rejected or even were hostile to the religions the institutions were intended to advance, then the shield against discrimination would destroy the freedom of Americans to practice their religions." *Spencer v. World Vision*, 633 F.3d 723, 742 (9th Cir. 2011) (Kleinfeld, J., concurring).

This is why Title VII and the employment discrimination statutes of nearly every state—including Washington before *Woods*—protect religious hiring standards well beyond the ministerial exception. Those laws allow religious groups to choose employees who share their faith, even for plainly non-ministerial positions. *See Amos*, 483 U.S. at 339 (Title VII exemption applied to all

[2] *See also Curay-Cramer v. Ursuline Acad. of Wilmington*, 450 F.3d 130 (3d Cir. 2006); *Kennedy v. St. Joseph's Ministries*, 657 F.3d 189 (4th Cir. 2011); *EEOC v. Miss. Coll.*, 626 F.2d 477 (5th Cir. 1980); *Killinger v. Samford Univ.*, 113 F.3d 196 (11th Cir. 1997).

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employees); 42 U.S.C. § 2000e(j) ("The term 'religion' includes all aspects of religious *observance and practice*, as well as belief … ." (emphasis added)). Indeed, nearly every state either offers a Title VII-style exemption or a broad occupational-qualifications exemption to protect religious employers. *See* Pet'r's App. at 202a, *SUGM*, 142 S. Ct. 1094 (No. 21-144) (conducting 50-state survey). The AG's newfound interpretation of the WLAD makes Washington a national outlier on religious hiring exemptions and walks straight into the First Amendment.

Under the church autonomy standard, SPU has clearly stated a claim. SPU has a sincere religious belief that "marriage is a covenant between a man and a woman, and that sexual experience is intended between a man and a woman in marriage." Dkt. #16 ¶ 30. To maintain its community of faith, SPU requires that all regular faculty and staff live in accordance with these beliefs. Dkt. #16 ¶¶ 32-33. Thus, any employment action taken against regular faculty or staff (or applicants for such positions) for being in a same-sex relationship is "rooted in religious belief" and protected by church autonomy. *Bryce*, 289 F.3d at 657.

The AG ignores all this authority and asserts that SPU's rights in hiring are limited to the ministerial exception. He asserts a straw man argument that SPU claims a "total exemption" from nondiscrimination laws. Dkt. #18 at 2. That is not SPU's position, nor is it the law. SPU doesn't dispute that the WLAD can constitutionally apply where SPU "does not offer a religious justification for an adverse employment action against a non-ministerial employee." *Curay-Cramer*, 450 F.3d at 142. But here, the AG's probe and threatened enforcement of the WLAD are targeted at SPU's religious policies and hiring practices, which are protected by church autonomy.

The cases the AG cites are not to the contrary; most are not even church autonomy cases. *Tony & Susan Alamo Foundation. v. Secretary of Labor* involved a religious employer trying to assert its *employees'* First Amendment rights. 471 U.S. 290, 303 (1985). It failed to articulate religious beliefs that were "actually burden[ed]." *Id.*; *see also id.* at 304. *United States v. Lee* involved no religious organization with church autonomy rights, just an individual who lost his Free Exercise claim on strict scrutiny. 455 U.S. 252, 257-61 (1982). Nor did *Bob Jones University v. United States*

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involve religious hiring rights; there, the government passed strict scrutiny based on its "fundamental, overriding interest in eradicating racial discrimination in education." 461 U.S. 595, 604 (1983). The courts have not applied the same reasoning to SPU's "decent and honorable" religious beliefs regarding marriage. *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015).

Finally, SPU's rights to expressive association and assembly also permit it to associate with those who share its religious practices for the purpose of religious exercise and expression. The AG makes no response to these arguments other than jurisdiction, which has been addressed above.

B. The First Amendment's ministerial exception bars the AG's wide-ranging probe of SPU's religious hiring standards. (Counts III and IV)

Under the ministerial exception, the government is "bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions." *Our Lady*, 140 S. Ct. at 2060. "State interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate *or even to influence* such matters would constitute one of the central attributes of an establishment of religion." *Id.* (emphasis added). The AG's probe tramples on these rights. The AG demanded that SPU turn over documents related to the employment of every "prospective, current, or former University faculty, staff, or administrator" over a period of five years, all employment "policies" related to "sexual orientation or status of being in a same-sex marriage and/or intimate relationship," all "complaints" regarding these policies, and job descriptions for all SPU employees, including "hiring criteria." Dkt. #16-1 at 2.

The AG now admits, as he must, that he cannot enforce the WLAD as to SPU's employees who qualify as "ministers," and he claims he won't. Dkt. #18 at 1, 7, 13, 17. But he has done nothing to limit the probe, and the sheer scope of the document demand belies any intent to respect the limits of the ministerial exception. While not all of SPU's employees are ministers, many of them are—some unquestionably so. *See, e.g.*, *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006) (chaplain at religious university); *see also Fratello*, 863 F.3d 190 (principal of Catholic school); *Orr v. Christian Bros. High Sch.*, No. 21-cv-15109, 2021 WL 5493416 (9th Cir. Nov. 23, 2021) (unpublished) (same), *cert. denied*, ___ S. Ct. ____, 2022 WL 4651533 (2022). But the AG explicitly demanded

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employment records about *all* "faculty, staff and administrators," to include the president, seminary professors, and the campus chaplain. Dkt. #16 ¶¶ 48-50. The AG made zero effort to exclude any ministers from the document demand.

The AG's "papers, please" approach is the antithesis of the "special solicitude" that the "First Amendment … gives to the rights of religious organizations." *Hosanna-Tabor*, 565 U.S. at 189. For "the very process of inquiry" into "the school's religious mission … may impinge on rights guaranteed by the Religion Clauses." *Catholic Bishop*, 440 U.S. at 502. The proper way to apply the ministerial exception is not a wide-ranging, preemptive probe. Instead, the proper way is a carefully cabined inquiry in a case by a particular claimant. The accepted practice is to first determine whether the plaintiff is a ministerial employee before allowing broader discovery on the reasons for the dismissal.[3] This approach minimizes judicial entanglement in the relationship between a church and its ministers. The AG cites no precedent supporting his approach.

C. The WLAD and the AG's probe violate the Free Exercise Clause.

A law that burdens the free exercise of religion is subject to strict scrutiny unless it is both neutral toward religion and generally applicable. *Fulton v. City of Philadelphia,* 141 S. Ct. 1868, 1876 (2021). The WLAD and the AG's probe are neither, and they fail strict scrutiny.

1. The WLAD is not generally applicable. (Counts V and VI)

A law is not generally applicable if it permits "conduct that undermines the government's asserted interest in a similar way." *Fulton*, 141 S. Ct. at 1877. The WLAD does just that.

[3] *See, e.g.*, *Fratello*, 863 F.3d at 198 ("[T]he district court appropriately ordered discovery limited to whether Fratello was a minister within the meaning of the exception."); *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1165 (4th Cir. 1985) (noting district court permitted limited discovery focused on the nature of the job where defendant asserted ministerial exception); *see also, e.g.*, *Garrick v. Moody Bible Inst.*, No. 18-cv-573, 2021 WL 5163287, at *2 (N.D. Ill. Nov. 5, 2021) (limited discovery to resolve ministerial exception first); *Fitzgerald v. Roncalli High Sch.*, No. 19-cv-04291, 2021 WL 4539199, at *1-2 (S.D. Ind. Sept. 30, 2021) (same); *Lishu Yin v. Columbia Int'l Univ.*, No. 15-cv-03656, 2017 WL 4296428, at *6 (D.S.C. Sept. 28, 2017) (same); *Grussgott v. Milwaukee Jewish Day Sch.*, 260 F. Supp. 3d 1052, 1053 (E.D. Wis. 2017) (same); *Stabler v. Congregation Emanu-El of the City of N.Y.*, No. 16-cv-9601, 2017 WL 3268201, at *7 (S.D.N.Y. July 28, 2017) (same); *Collette v. Archdiocese of Chi.*, 200 F. Supp. 3d 730, 732 (N.D. Ill. 2016) (same); *Fassl v. Our Lady of Perpetual Help Roman Catholic Church*, No. 05-cv-0404, 2005 WL 2455253, at *1 (E.D. Pa. Oct. 5, 2005) (same).

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First, the WLAD cannot be "generally applicable" when, by its own text, religious groups like SPU are entirely exempt. The legislature expressly exempted "any religious or sectarian organization not organized for private profit." RCW 49.60.040(11). And when it added sexual orientation and gender identity to the WLAD, it again acknowledged that religious nonprofits were exempt. Final Bill Report at 1, https://perma.cc/994C-FCQD. On its face, it undermines its own goals by wholly exempting a host of religious groups.

This conclusion is not changed by *Woods*, which left the statutory exemption in place for ministerial employees, and perhaps more broadly, depending upon the type of discrimination claim. 481 P.3d at 1069-70. Where a law contains exemptions that undermine the government's interest, the government must prove, under strict scrutiny, why that exception cannot be extended to cases of religious hardship. *Fulton*, 141 S. Ct. at 1877-78.

Second, the WLAD is not generally applicable because it has several secular exemptions. "[G]overnment regulations are not neutral and generally applicable … whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam). Here, the WLAD permits *any* small business with seven or fewer employees to make employment decisions on the basis of sexual orientation or gender identity. RCW 49.60.040(11). It also allows discrimination against employees in "domestic service," as well as employees in any field whose boss is a close family member. RCW 49.60.040(10).

Whether these secular exemptions "are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Tandon*, 141 S. Ct. at 1296. The AG asserts an interest in "the enforcement of state civil rights laws." Dkt. #18 at 23. But an interest in enforcing the law can't justify the law—that's circular. The AG also mentions the "dignity and worth" of LGBTQ people. *Id.* SPU agrees that all people "are created in God's image" and must be "treated with respect and dignity." Dkt. #16-2 at 1. SPU also holds traditional Christian beliefs about marriage and sexual intimacy. *Id.* at 1-2. If SPU's employment

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policies based on these "decent and honorable" religious beliefs, *Obergefell*, 576 U.S. at 672, undermine Washington's interests, they do so less than an exempt small business that is free to discriminate based on outright hostility to LGBTQ people.

The AG's only other argument is that the WLAD is generally applicable because the Washington Supreme Court says it is. Dkt. #18 at 20 (citing *State v. Arlene's Flowers*, 441 P.3d 1203, 1231 (Wash. 2019)). But *Arlene's Flowers* has no bearing here. The court there expressly refused to consider exemptions related to employment. 441 P.3d at 1230. Even if it had, the Washington Supreme Court is not the final authority on the application of the U.S. Constitution to state law. The decisions of the U.S. Supreme Court control.

2. The WLAD is neither neutral nor neutrally enforced. (Counts VII and VIII)

"Government fails to act neutrally when it … restricts practices because of their religious nature" or "proceeds in a manner intolerant of religious beliefs." *Fulton*, 141 S. Ct. at 1877. Here, the application of the WLAD to SPU's religious hiring policies is not neutral.

First, the WLAD, as altered by *Woods*, targets religion because "the only conduct subject to [it] is … religious exercise." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 535 (1993). *Woods* invalidated a provision that applied to religious nonprofits only. *Cf. Stormans*, 586 F.3d at 1130 (neutral law "make[s] no reference to any religious practice, conduct, or motivation"). It did not invalidate other, secular exceptions from the law. *Supra* Section III.C.1. Now that the religious exemption is revoked, the WLAD targets "religion, and religion alone." *Stormans*, 586 F.3d at 1134.

Second, the AG is applying the WLAD to SPU in a non-neutral manner. SPU alleges that the AG "is wielding state power to interfere with the religious beliefs of a religious university, and a church, whose beliefs he disagrees with." Dkt. #16 ¶ 8. There is no indication that he has launched similar investigations into other religious nonprofits post-*Woods*. *Id.* ¶¶ 64, 144. Instead, he is targeting SPU. *Id.* ¶ 145. He justifies his actions based upon complaints received from those on one side of an ongoing religious dispute, *id.* ¶¶ 42-44, 67, not by an actual aggrieved employee, *id.* ¶¶ 43, 141-43. Furthermore, the AG is not treating this like a typical case—he has arrogated the

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statutory power of the Human Rights Commission and is "personally" overseeing the investigation. *Id.* ¶ 111; Dkt. #16-3 at 1. He also has a history of going after individuals and groups who share SPU's religious beliefs about marriage and then publicizing his actions. Dkt. #16 ¶ 63. Finally, the AG attacked SPU in the media, characterizing SPU's efforts to protect its First Amendment rights as "demonstrat[ing] that the University believes it is above the law to such an extraordinary degree," and called for more complaints against SPU. Dkt. #16-4 at 1. SPU has thus alleged that the AG is not applying the WLAD in a neutral manner. *See, e.g.*, *Lukumi*, 508 U.S. at 535-42; *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 46 F.4th 1075, 1093-98 (9th Cir. 2022) (lack of neutrality shown through selective enforcement of policies).

3. SPU properly pleaded that the AG has not met strict scrutiny.

"A government policy can survive strict scrutiny only if it advances interests of the highest order and is narrowly tailored to achieve those interests." *Id.* (cleaned up). This is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). SPU has alleged that the AG lacks a compelling interest, particularly since other exceptions undermine that interest. Dkt. #16 ¶¶ 117, 124, 127.

Under *Fulton*, "[t]he question … is not whether [Washington] has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception" to SPU. 141 S. Ct. at 1881. The Washington legislature's decision to expressly give that exemption in the text of the WLAD disclaims any compelling state interest in denying it now. Furthermore, the WLAD's other exceptions for small businesses, domestic workers, and family employers "undermine[]" any "contention that [the state's] non-discrimination policies can brook no departures." *Id.* at 1882.

The AG has also selected the most—not least—restrictive means to further his interest. His probe squarely targets SPU's church autonomy right to hire according to its faith. *Supra* Section III.C.2. But even if the WLAD could be applied constitutionally to SPU's non-minister employees, the AG concedes that the probe must use the "least restrictive means" to "limit[] any potential burden on SPU's First Amendment rights" under the ministerial exception. Dkt. #18 at 23-24. As

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explained above, the AG's categorical demand for years' worth of documents related to *every* "prospective, current, or former faculty, staff, or administrator" at SPU, Dkt. #16-1 at 2, is the most restrictive means. The First Amendment requires more.

D. SPU has stated a claim for First Amendment retaliation. (Count I and XI)

To state a claim for First Amendment retaliation, SPU must plausibly allege that (1) it "engaged in constitutionally protected activity," (2) the AG's "actions would chill a person of ordinary firmness from continuing to engage in the protected activity," and (3) "the protected activity was a substantial motivating factor" in the AG's conduct. *Koala v. Khosla*, 931 F.3d 887, 905 (9th Cir. 2019). SPU's two retaliation claims satisfy each element.

1. The probe is unconstitutional retaliation for First Amendment activity.

SPU has stated a retaliation claim under the Free Speech and Free Exercise Clauses (Count I). First, the AG does not dispute that SPU has alleged engagement in constitutionally protected activity. *See* Dkt. #18 at 21-23. SPU's employment policies are an exercise of its sincerely held religious beliefs on sexuality and marriage and are an important way that SPU fulfills its mission as a religious university. Dkt. #16 ¶¶ 29-33. Such activity is constitutionally protected. *See generally, e.g.*, *Our Lady*, 140 S. Ct. 2049; *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

Second, the AG's conduct—launching a probe, demanding information on SPU's policies and their application, and threatening enforcement—would chill a person of ordinary firmness. It is well established that retaliatory investigations and informal threats of legal sanction can chill First Amendment activity. *See White v. Lee*, 227 F.3d 1214, 1226 (9th Cir. 2000) (agency investigation into plaintiffs' activities and directives to produce documents under threat of subpoena); *Brodheim v. Cry*, 584 F.3d 1262, 1270-71 (9th Cir. 2009) (threat of unwarranted prison discipline); *see also Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 402 (1950) ("Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes."); *Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003) ("A public-official defendant who threatens to employ coercive state power to stifle

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protected speech violates a plaintiff's First Amendment rights, regardless of [the form of] the threatened punishment … ."). Pressure to change SPU's hiring policies is not an unforeseen effect of the AG's probe—it is the point. Surely the AG will not claim otherwise.[4]

The AG argues that the "limited" "potential consequences" of not cooperating with his probe precludes any chill. Dkt. #18 at 21-22 Not so. In *Bantam Books v. Sullivan*, the Supreme Court held that a state commission's notices labeling books objectionable and threatening prosecution constituted illegal censorship even though the commission had no "power to apply formal legal sanctions." 372 U.S. 58, 66-68 (1963). The Court found it irrelevant that the book retailer "was 'free' to ignore the Commission's notices, in the sense that his refusal to 'cooperate' would have violated no law," because "[p]eople do not lightly disregard public officers' thinly veiled threats." *Id.* at 68. So too here. The AG's actions are reasonably likely to deter an ordinary person.

Finally, SPU has plausibly alleged that its protected activity was a substantial motivating factor in the AG's conduct. The AG's probe seeks information on any and all faculty and staff. Dkt. #16 ¶¶ 46-53; Dkt. #16-1 at 2. SPU has alleged that some of those employees are ministers, and the AG does not appear to disagree. *See* Dkt. #16 ¶¶ 48-49; Dkt. #18 at 4, 7, 10. But he has not backed down from seeking information on those ministerial relationships. The AG also freely acknowledges he is probing SPU's policies regarding non-ministerial employees. Dkt. #16 ¶ 75; *see* Dkt. #18 at 1-5, 17, 22. But the First Amendment protects the application of SPU's policies to them, too. *See supra* Section III.A. Accordingly, SPU has "allege[d] plausible circumstances connecting the defendant's retaliatory intent to the suppressive conduct." *Koala*, 931 F.3d at 905 (cleaned up).

In arguing that SPU must allege "the absence of probable cause," the AG relies on cases concerning claims of retaliatory arrest and prosecution. Dkt. #18 at 22; *see Nieves v. Bartlett*, 139 S. Ct. 1715 (2019). But the Ninth Circuit has declined to extend the no-probable-cause requirement beyond such claims. *See Bello-Reyes v. Gaynor*, 985 F.3d 696, 700-01 (9th Cir. 2021) (retaliatory

[4] The AG cites various out-of-circuit cases that arose in the context of public employment. *See* Dkt. #18 at 21-22. But those situations are subject to the *Pickering* balancing test; the government has more leeway when it acts as employer, rather than as sovereign. *See, e.g.*, *Hernandez v. City of Phoenix*, 43 F.4th 966, 976 (9th Cir. 2022); *Dahlia v. Rodriguez*, 735 F.3d 1060, 1066-67 (9th Cir. 2013) (en banc).

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immigration bond revocation); *Skoog v. County of Clackamas*, 469 F.3d 1221, 1232-35 (9th Cir. 2006) (retaliatory search and seizure); *see also Colonies Partners LP v. County of San Bernadino*, No. 18-cv-420, 2020 WL 5102160, at *14 (C.D. Cal. July 28, 2020) (holding "Plaintiffs do not need to establish the lack of probable cause to investigate"); *Denney v. DEA*, 508 F. Supp. 2d 815, 830 n.4 (E.D. Cal. 2007) ("heightened probable cause standard is inappropriate" for retaliatory investigation claim). This case is a particularly bad fit for such expansion, since the AG acknowledges that at least some of SPU's activities are shielded by the ministerial exception.

2. The call for more complaints is retaliation under the Petition Clause.

SPU has also stated a retaliation claim under the Petition Clause (Count XI). First, SPU's filing this lawsuit is constitutionally protected activity under the Petition Clause. *See Soranno's Gasco v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989). Second, the AG's public call for additional complaints against SPU in furtherance of an ongoing retaliatory investigation is reasonably likely to further chill an ordinary person. *Cf. Moore-Duncan ex rel. NLRB v. Aldworth Co.*, 124 F. Supp. 2d 268, 293 (D.N.J. 2000) (finding "ample reason to conclude that … unlawful solicitation of grievances, threats, and disciplinary measures … would chill further union activity"). Third, the AG issued the press release in direct response to the lawsuit, asserting that the "lawsuit demonstrates that [SPU] believes it is above the law to such an extraordinary degree." Dkt. #16-4. This plausibly establishes motive. *See Koala*, 931 F.3d at 905 (motive plausibly alleged given "release of a statement … that strongly denounced" plaintiff's speech) (cleaned up); *Arizona Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 870-71 (9th Cir. 2016) (motive plausibly alleged where defendant "publicly acknowledged" that its conduct "resulted from" plaintiff's advocacy).

CONCLUSION

The AG's motion to dismiss the First Amended Complaint should be denied.

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Respectfully submitted this 11th day of October, 2022.

THE BECKET FUND FOR RELIGIOUS LIBERTY

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